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Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1990

JEROME B. ROSENTHAL,

Petitioner,

vs.

"JUSTICE DEFENDANTS", and
"ORGANIZATION DEFENDANTS"
(Full listing of all parties
appears in this Petition, p.vi)

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

(Appendices 1 - 17, in accompanying, separate volume)

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Petitioner, Pro Se

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QUESTIONS PRESENTED FOR REVIEW

1. Are the constitutional (federal) rights of confrontation and cross-examination, and of the presumption of innocence guaranteed and available to the "accused" in quasi-criminal proceedings (as they are in criminal proceedings)?

2. When highest court of state (California Supreme Court) functionally acts as an original trial court (in lawyer-discipline proceedings) is a state statute which, before that Court, shifts the burden of proof of innocence to the "accused" (denying accused his

right to presumption of innocence and imposing on him the burden of overcoming a presumption of intentional wrongdoing) facially unconstitutional in violation of due process rights under the 14th Amendment (U.S.)?

3. Is a state statute which permits the admission into evidence (in a lawyer-discipline proceeding) copies of "findings, conclusions...entered in any court of record" and under which "accused" lawyer has no opportunity to be confronted by or to cross-examine the "author" of the "findings, conclusions..." unconstitutional in violation of 6th and 14th Amendments (U.S.)

confrontations/cross examination rights and due process provisions, respectively?

4. Does a justice of a state's highest Court, who, having invited parties' objection, and upon receiving objection of Petitioner, recused himself from any further participation in a proceeding, who later issues and signs a final and dispositive order in that proceeding, in so doing act in the absence of any, or merely in excess of, jurisdiction? In which, if either event, does the justice lose his judicial immunity, and become liable for damages to plaintiff in 42 U.S.C. 1983 Civil Rights case? (Appendix 3)

5. Are integrated state bar organizations (like California State Bar) "labor organizations", under the Labor Management Reporting and Disclosure Act ("LMRDA") (29 U.S.C. Section 402 et seq.) which requires such organization(s) to provide a "full and fair hearing" before disciplining or expelling a member (lawyer)?

6. Where state law conflicts with or impedes the operation of federal law, e.g., LMRDA, (when both federal and state principles regulate conduct), is state action preempted, or is federal law controlling under the Supremacy Clause, U.S.

Constitution Article VI, Section 2?

7. Where suit is brought in Federal Court seeking to enforce plaintiff's federal constitutional rights in general challenges of state statutes' federal constitutionality, does Federal (District) Court lack subject-matter jurisdiction, where plaintiff does not seek review of any decision of state's highest Court in a Bar matter?

LIST OF PARTIES

Appellant/Petitioner: JEROME B. ROSENTHAL

Defendants/Appellees: "JUSTICE DEFENDANTS": JUSTICES OF THE SUPREME COURT OF CALIFORNIA, ALLEN BROUSSARD, ACTING CHIEF JUSTICE; AND HONORABLE EDWARD PANELLI, HONORABLE JOHN A. ARGUELLES, HONORABLE DAVID N. EAGLESON, HONORABLE MILDRED LILLIE, HONORABLE VAINO SPENCER, HONORABLE MARCUS KAUFMAN, JUSTICES; MALCOLM M. LUCAS, CHIEF JUSTICE; "ORGANIZATION DEFENDANTS": STATE BAR OF CALIFORNIA MARY WAILES, SECRETARY OF STATE BAR OF CALIFORNIA; TERRY ANDERLINI, PRESIDENT OF STATE BAR OF CALIFORNIA.

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REPORTS OF OPINIONS

DELIVERED IN THE CASE

1. - Order, November 21, 1988, U.S. District Court, N.D.Cal., Case No. C 87-3104 TEH, Dismissing Plaintiff's (here Petitioner) case with prejudice. (See Appendix 6)

2. - Opinion, in Rosenthal (here Petitioner) v. Justices of The Supreme Court of California, U.S. Court of Appeals, Ninth Circuit, August 1, 1990, affirming District Court (1. above) 910 F.2d 561 (9th Cir., 1990) (Appendix 7)

3. -Order, U.S. Court of Appeals, Ninth Circuit, September 10, 1990 denying Appellant's (here Petitioner's) Petitioner for Rehearing - (Appendix 8).

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

Date of entry of Judgment (Opinion of the United States Court of Appeals For The Ninth Circuit: August 1, 1990)

Date of Order of U.S. Court of Appeals, Ninth, denying Petition for Rehearing: September 10, 1990

STATUTORY PROVISION

The jurisdiction of the Court is invoked under 28 U.S.C. Sections 1254 and 1257(c).

CONSTITUTIONAL PROVISIONS, STATUTES

1. U.S. Constitution, 6th Amendment

Appendix 2

STATE STATUTES, RULES

LIST OF APPENDICES

LIST OF APPENDICES (Cont'd)

No.

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October Term, 1990

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
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FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

STATEMENT OF THE CASE

After Petitioner's disbarment by California Supreme Court in 1987, and this Court's ruling "no jurisdiction", Petitioner filed suit in the U.S. District Court, N.D. California. On appeal from District Court's order dismissing Petitioner's complaint, Court of Appeals (9th Cir.) reversed and remanded (April 29, 1988) holding, inter alia, that to the extent that Petitioner's Complaint presented "a facial challenge to the constitutionality of Section 6083(c) requiring the district court to independently assess the validity of the rule, rather than review the final judgment of the state court, the court had subject-matter jurisdiction over the complaint." (Appendix 14)

Petitioner, as plaintiff filed First Amended and Supplemental Complaint ("FASC"), July 26, 1988, U.S. District

Court, Northern District of California (Appendix 15), stating three claims. Claim One: against Justices of the California Supreme Court, alleging that Justice Defendants had deprived, were depriving and threatened to continue to deprive Petitioner of his federal civil and constitutional rights by utilizing facially, federally unconstitutional state statues. Petitioner sought to restrain Justice Defendants from continuing and future enforcement of these state statutes: (1) California Business and Professions Code, Section 6083(c), (Appendix 12) a burden-shifting statute which Petitioner alleged deprived him of the presumption of innocence and concomitantly imposed on him the burden of establishing his freedom from guilt of wrongdoing (2) Business and Professions Code Section 6049.1, (Appendix 11) on the alleged ground that it deprived him of

rights of confrontation and cross-examination.

FASC, Para. 10 alleged that Petitioner "does not seek any review, appeal or quasi-appeal of or from, respectively any final act or decision of the Justice Defendants (whether acting collectively as the California Supreme Court, or otherwise). Instead, plaintiff seeks (in Claim One hereof) only to enjoin and prevent (Justice) Defendants from enforcing, as threatened (by requiring compliance with Rule 955 and otherwise and by threatening to find and punish Plaintiff for contempt) the unconstitutional consequence arising from Defendants' following of the facially unconstitutional statutes...." FASC further alleged (Appendix 15) that the Defendant Justices of the California Supreme Court had ignored Plaintiff's constitutional attacks on Sections

6083(c) and 6049.1, and had not thentofore entertained or ruled upon them.

Claim Two: for damages against Chief Justice Hon. Malcolm M. Lucas on the ground that after the Honorable Justice Lucas had recused himself (Appendix 17) "as disqualified from further participation in the proceeding (review) of State Bar recommended disbarment of plaintiff then before the California Supreme Court, Defendant Lucas "notwithstanding his disqualification and his total lack and absence of any jurisdiction" on September 2, 1987, (Appendix 16)..."intentionally and maliciously signed an order denying plaintiff's petition for rehearing of the disbarment order." FASC further alleged that the actions of defendant Lucas were committed by him under color of state law, custom or usage, causing plaintiff

(petitioner) to be deprived of rights and privileges secured by due process rights of the federal constitution and federal laws, seeking consequential and punitive damages.

Claim Three: sought injunctive relief and compensatory and punitive damages against Organization Defendants (State Bar of California, its secretary and its president) alleging that those defendants had unanimously recommended expelling petitioner (from membership in Organization Defendant) in direct violation of plaintiff's rights to a full and fair hearing under the Labor Management Reporting and Disclosure Act, and further alleging that Organization Defendant (State Bar) is a "labor organization" under Section 402 of Title 29 U.S.C. subdivision (i). FASC (Appendix 15) details allegations showing

facts constituting "denial of full and fair hearing."

[The basis for federal jurisdiction in the U.S. District Court is as follows:

-Claim One: 28 U.S.C. Section 2201, and FRCP, Rule 65.

-Claims One and Two: 28 U.S.C. Section 1331, 1343(3)(4).

-Claim Three: 29 U.S.C. Section 185(c)(2), and Sections 411(a)(1), (5)(A)(B)(C), and Section 412.]

Both groups of defendants ("Justice Defendants" and "Organization Defendants") made motions to dismiss the action in the complaint.

On November 21, 1988, U.S. District Court dismissed all three claims of

plaintiff's (petitioner's) First Amended and Supplemental Complaint. Order. (Appendix 6)

NOTE: Because the District Court's November 21, 1988 Order dismissed the case and complaint under FRCP 12(b)(6), the allegations of the FASC are, to the extent well-pleaded, are treated as true. Hospital Bldg. Co. v Trustees, 425 U.S. 738. Those allegations may well be indispensible to this Court's consideration of this Petition. Accordingly the "First Amended and Supplemental Complaint (FASC) is set forth verbatim, as Appendix 15, for this Court's convenience.

Petitioner timely filed Notice of Appeal (to U.S. Court of Appeals, Ninth Circuit), and following argument (March 13, 1990), the Court of Appeals, on August 1, 1990 filed and entered its

Opinion, affirming the judgment of the U.S. District Court. (910 F.2d 561)

Petitioner timely filed his (Appellant's) Petition for Rehearing in the United States Court of Appeals, Ninth Circuit, on August 20, 1990.

The Court of Appeals, on September 10, 1990 entered its Order: "Appellant's petition for rehearing is denied." (Appendix 8)

ARGUMENT

(Paragraph Nos. below correspond, to the extent practicable, to the numbers under the section (supra) entitled "QUESTIONS PRESENTED FOR REVIEW".)

1. **The rights of confrontation and cross-examination, as well as the right to the presumption of innocence, under federal law, are guaranteed and available to the "accused" in quasi-criminal proceedings (as they are in criminal proceedings).**

The "quasi-criminal" character of California State Bar Disciplinary proceedings is beyond dispute, and is tacitly or actually conceded in this instance. **Golden v State Bar** (1931) 213 Cal. 237, 247; 2 P2d 325; **Furman v State Bar** (1938) 12 Cal.2d 212, 239; 83 P2d 12;

Herrscher v State Bar (1935) 4 Cal.2d 399, 403, 421; 49 P2d 812.

Even more significantly, this Court itself has held in attorney-discipline matter focusing on state statutory and rule procedure, explicitly:

> "These are adversarial proceedings of a quasi-criminal nature. Cf. In re Gault, 387 U.S. 1, 33; 87 S.Ct. 1428, 1446." In re Ruffalo (1968) 390 U.S. 544, 551; 88 S.Ct. 1222, 1226.

Similarly, In re Gault (1967) 387 U.S. 1; 87 S.Ct. 1428, 1446 also requires a due process standard constitutionally adequate, in a civil or criminal proceeding. Gault goes so far as to say that constitutional due process is guaranteed to an "accused" whether the proceeding is labelled "civil or criminal." Id 387 U.S. 1, 35.

In Willner v Committee, a bar admission case, 373 U.S. 96, the court,

in deciding that denying petitioner the right of confrontation violated due process, stated "We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of livelihood."

Finally, in Coy v Iowa, 487 U.S. ___, 101 L.Ed.2d 857 (June 29, 1988), this Court held that there must be actual confrontation, and that there is no substitute therefor; the procedure that deprives an accused of that right of actual confrontation is unconstitutional.

Thus, the U.S. Court of Appeals, Ninth Circuit, in this matter in its Opinion, 910 F.2d 561, 564 stating..."a lawyer disciplinary proceeding is not a criminal proceeding." and thereby concluding that petitioner's attack on the constitutionality of Section 6083(c) is rejected, has decided a federal

question in a manner that conflicts with the applicable decisions of this Court.

Similarly, the Court of Appeals, (Id. 565) in stating: "We reject Rosenthal's confrontation clause claim. The confrontation clause is a criminal law protection. Therefore, it does not apply to a disbarment case.", has decided a federal question in a way that directly conflicts with the applicable decisions of this Court.

2. **When state's highest court functions as an original trier of fact, a state statute which, before that court, shifts the burden of proof of innocence to the "accused" (denying his right to presumption of innocence and imposing on him the burden of overcoming a presumption of intentional wrongdoing) is facially unconstitutional in violation of**

due process rights under the 14th Amendment.

In its role in deciding disciplinary proceedings, the California Supreme Court is the first and only authority that has the right or jurisdiction to decide upon the issues of guilt or innocence, and discipline. Two principles are not disputed and are deeply entrenched in California law:

> (1) That the State Bar has no authority to decide the issue of guilt or innocence or to make any dispositive decision; its authority and function is limited to the making of recommendations to the California Supreme Court; and

(2) The California Supreme Court in bar discipline matters, must and does independently review the record and the evidence, and predicate its dispositive decision on the basis of its own independent determinations (albeit that the Court considers and gives great weight to the recommendations of the State Bar).

Thus, although the California Supreme Court is a Court of "review", and one of last resort and appeal, in dealing with discipline matters, the California Supreme Court is not dealing with an appeal to it from a lower state court, and is not engaged in judicial review of any lower court decisions or of the decisions of any quasi-judicial body.

In that context, i.e., before the functional, actual original trier of fact, Section 6083(c) unconstitutionally shifts the burden to the accused (lawyer) to prove his innocence. Miller v Norvell (1985) 775 F.2d 1572, 1576; cert. denied (1986) 90 L.Ed.2d 675; Sandstrom v Montana (1975) 442 U.S. 510; Connecticut v Johnson (1983) 460 U.S. 73.

In the recent case of Carella v California, 491 U.S. ___, 105 L.Ed.2d 218 (1989), this Court held that jury instructions that the accused defendant was presumed to have wrongful intent or to have committed a crime, violated due process clause of the 14th Amendment.

The Court of Appeals, Ninth Circuit, in this case has decided an important question of federal law in a way which conflicts that the applicable decisions of this Court.

3. **A state statute which permits admission into evidence (in a lawyer-discipline proceeding) copies of "findings, conclusions...made or entered in any Court of record", and under which "accused" lawyer has no opportunity to be confronted by or to cross-examine the "author" of the "findings, conclusions..." is unconstitutional in violation of the 6th and 14th Amendments, U.S.**

The relevant portion of Section 6049.1 reads: "In all disciplinary proceedings in this state...copies of findings, conclusions, orders or judgments made or entered in any court of record...shall be admissible in evidence..." (California Business and Professions Code, Section 6049.1).

It is undisputed that "findings of the bankruptcy court" contained in

certain certificates of review authored by the referee (Texas) were admitted into evidence in the disciplinary proceeding, over objection, to support accusations of wrongdoing by petitioner; those inflammatory and highly prejudicial certificates of review thus admitted in evidence were used by the decision maker, i.e. the California Supreme Court.

Thus, by reason of the statute, Section 6049.1, petitioner was effectively deprived of any opportunity to confront or cross-examine the author (referee in bankruptcy) of the "findings, conclusions..." which were admitted in evidence in the State Bar disciplinary proceedings.

In Willner v Committee (1963) 373 U.S. 96, this Court held that confrontation and cross-examination were required rights, particularly of those whose word 'at least in part, deprives a

person of his livelihood', citing Greene v McElroy (1958) 360 U.S. 474, 492, 496. See Berger v California (1969) 393 U.S. 314; and Gerstein v Pugh (1975) 420 U.S. 103; and Coy v Iowa, 487 U.S. ___, 101 L.Ed.2d 857 (1988).

Thus, here again in this denial of rights of confrontation and cross-examination, the Court of Appeals has decided a federal question in a way that conflicts with the applicable decisions of this Court.

4. A state court justice, after inviting and receiving party's objection to his participation in the proceeding, and upon receiving such objection of petitioner, recused himself from any further participating in a proceeding, but nonetheless later issues and signs a final order against Petitioner in that proceeding, in so doing is acting in the

absence of any jurisdiction. In such event, the justice loses his judicial immunity and becomes liable for damages to plaintiff in a 1983 civil rights case.

A state judge, under federal principles, who has disqualified himself, and acted in absence of any jurisdiction, is liable for his violations of plaintiff's civil rights under 42 U.S.C. Section 1983. There is striking factual similarity to the instant case because in both cases the judicial official in question recused himself and was stated to be disqualified. Spires v Bottoroff (1963, 9th Cir) 317 F.2d 273, 274, 275. It has also been held that should a justice or judge "recuse or disqualify himself at any time, he is out of service insofar as that particular case is concerned. To disqualify means to debar legally. See Webster's New International

Dictionary, 2d Ed., P. 753. That is synonymous with lack of legal capacity, i.e., with inability to serve." Arnold v Eastern Airlines (1983) 712 F.2d 899, 906. In Giometti v Etienne (1934), 219 Cal. 687,689, the California Supreme Court observed that appellate justices are subject to the rules of disqualification which apply to judges generally. See also Aetna Life Insurance Company v Lavoie (1986) 475 U.S. 813.

A judge or justice who acts in clear or complete absence of any jurisdiction loses his immunity and is liable for damages. Gregory v Thompson (1974) CCA 9 500 F.2d 59, 62.

The Court of Appeals, Ninth Circuit, has held: "But when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost.

See Bradley v Fisher, 80 U.S. (13 Wall) at 351 ("When the want of jurisdiction is known to the judge, no excuse is permissible."); Turner v Raynes, 611 F.2d 92, 95 (Cir. 5, 1980) (Stump is consistent with the view that "a clearly inordinate exercise of unconferred jurisdiction by a judge - one so crass as to establish that he embarked on it either knowingly or recklessly - subjects him to personal liability.") **Rankin v Howard** (1980) CCA 9, 633 F.2d 844, 849.

"He (Judge) can be subject to liability only when he has acted in the clear absence of all jurisdiction." Stump v Sparkman (1978) 435 U.S. 349, rehearing denied 436 U.S. 951.

The recent case of Forrester v White, 484 U.S. 219 (1988) establishes the sound principle that the actual function performed, and not the "label" attached

to it, determines the nature of the conduct or act performed.

Hence, in deciding that the self-recused justice in the California Supreme Court did not lose his immunity against liability for damages when after his recusal, he nevertheless violated its terms by participating in the proceedings (signing an order denying application for rehearing), on the ground that the order was a judicial act, the Court of Appeal has either decided an important question of federal law which has not been, but should be, fully settled by this Court, or has decided the question in a way that conflicts with the applicable decisions of this Court.

5. **Integrated State Bar Organizations (such as California State Bar), are "labor organizations", under the Labor Management Reporting and**

Disclosure Act ("LMRDA"), 29 U.S.C. Section 402 et seq., which requires that such organization(s) to provide a "full and fair hearing" before disciplining or expelling a member (lawyer).

California State Bar is a labor organization as defined in LMRDA statute itself, i.e., 29 U.S.C. 402(i) under the heading of "Definitions":

> "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment..." (Emphasis added)

The State Bar (California) "exists

for the purpose, in part, of dealing with employers [1].

The practice of law has been regarded as a "business", and this Court has held that "In the modern world, it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce." Goldfarb et ux. v Virginia State Bar, 421 U.S. 773, 788. "The Members of the State Bar are all persons admitted and licenses to practice

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[1] Independent contractors have been held to be considered as employers, are covered by LMRA. Detroy v American Guild (1960, 61) concerning grievances...rates of pay...or other terms and conditions of employment. Those are the very subjects of complaints (by client-employers) against lawyers (member-independent contractor-employees). California Bus. and Prof. Code Section 6086 provides as follows: "The Board of Governors, subject to the provisions of this chapter, may by rule provide the mode of procedure in all cases of complaints against members". (That statute was in force at all times pertinent to this case).

law in this State except justices and judges of courts of record..." Calif. Bus. & Prof. Code Section 6002. Under related provisions of the State Bar Act, the State Bar, through its Board of Governors (previously enumerated functions in the State Bar Act) (6001-6031) which include the representation of (through committees or otherwise) lawyer-members. Those provisions collectively and interrelatedly clearly satisfy the "representation" requirement of LMRDA. The FASC (Appendix 15) sets forth the detailed facts concerning the conduct of the "Organization Defendants" alleging the conduct of Organization Defendants which deprive petitioner a "full and fair hearing" within the provisions of LMRDA Section 411(a)(5), which reads as follows:

> "No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been...(C)afforded a full and fair hearing."

The Court of Appeals, Ninth Circuit in deciding that the California State Bar is not a labor organization as defined in LMRDA has sanctioned a departure by a lower court (United States District Court) from the accepted and usual course of judicial proceeding, so as to call for an exercise of this Court's power of supervision. That proscribed departure by the U.S. District Court consists of its clearly erroneous disregard of the federal statute, and arbitrary, unsupported by any pertinent authority, determination that the district court "lacks subject matter jurisdiction to consider plaintiff's claim under LMRDA." (Order, U.S.District Court, Appendix 6.

Further, the Court of Appeals, Ninth Circuit, has decided an important question of law which apparently has not been, but should be settled by this Court or arguably, has decided a related federal question in a way that conflicts with applicable decisions of this Court.

6. **When state law conflicts with or impedes the operation of federal law such as LMRDA (when both federal and state principles regulate conduct), state action is preempted or is controlled by federal law, under the Federal Supremacy Clause, U.S. Constitution, Article VI, Section 2.**

A state action is preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, under the Federal Supremacy Clause. This

Court has so held in Brown v Hotel Employees (1984) 468 U.S. 491, 501. If state law regulates conduct that is actually protected by federal law, preemption follows as a matter of substantative right. (During the week preceding the completion of this Petition, the California Supreme Court announced its decision in Screen Extras Guild v Superior Court and Barbara Smith, RPI, on December 3, 1990 in Case No. S006813, 90 Daily Journal DAR 13830; an LMRDA case, in which the California Supreme Court applied Federal Supremacy and resulting preemption in case of conflict or partial conflict between federal and state laws, relying on decisions of this Court).

> "Where the issue is one of substantative conflict with federal law, 'the relative importance to the state of its own law is not material...for the Framers of our Constitution

> provided that the federal law must prevail. Brown v Hotel Employers, supra, 468 U.S. at p. 503 and Free v. Bland (1962) 369 U.S. 663, 666. In such cases state action is preempted, without balancing state and federal interests, by direct operation of the supremacy clause of the United States Constitution...Brown v Hotel Employers, supra, 463 U.S. at p. 501.

In Keller v State Bar of California, ___U.S. ____, 110 S.Ct. 2228 (1990) this Court reversing the Supreme Court of the State of California held that although lawyers admitted to practice in California may be required to join and pay dues to the State Bar, the State Bar's use of some of the dues thus paid for the purpose of advancing political causes with which plaintiff-members did not agree because such activity by the State Bar, in effect, violated plaintiff's federal First Amendment Rights.

This Court held that "compulsory dues may not be expended to endorse or advance a gun control or nuclear weapons freeze initiative; at the other end of the spectrum petitioners have no valid consitutional objection to their compulsory dues being spent for activities connected with disciplining members of the Bar or proposing ethical codes for the profession."

In Screen Extras Guild ("S.E.G.") vs. Smith (1990), supra, at p. 13839 after original enactment the perceived need to provide additional protection led to the inclusion of amendments embraced in subchapter 11 (Sections 411-415), the "Bill of Rights" for union members. In relying on this Court's opinion in Finnegan v Leu, 456 U.S. 431, 435-436, the California Supreme Court held that the action of a business agent (an employee) of the Screen Extras Guild, for

wrongful discharge was preempted by LMRDA and the "strong federal policy favoring union democracy it embodies." S.E.G. v Smith, supra 13834.

Although the law may not be clear as to whether Federal Supremacy, federal preemption, or partial federal preemption applies, exhaustive research has not disclosed any, suggestion that state law controls over federal law and preclude the application of federal constitutional, statutory or decisional law to protect federal rights of a member of a labor organization such as the State Bar.

The last sentence suggests the possible implication of "federal abstention". But the abstention doctrine is not any way involved. The FASC itself in the conclusory allegation states (Appendix 15): "The foregoing allegations in this paragraph 10

constitute these well-established exceptions to the doctrine of Younger : bad faith, initiating conduct and prosecution of proceedings; harassing and continuing to harass plaintiff; unusual circumstances calling for equitable relief; and consequent, continuing, ongoing and threatened irreparable injury to plaintiff (petitioner)."

Quite apparently, the decisions below and that of the California Supreme Court in Screen Extras Guild v Smith have decided an important question of federal law which has not been, but should be settled by this Court. Narrowed, the question is whether the importance of the state interest in disciplining lawyer members of the State Bar is such that the state procedures should preclude a member's right to seek the protection guaranteed him by federal constitutional provisions and statutes. In other words,

when the federal constitutionality of state statutes is challenged, which "system" should yield? State or Federal?

7. **In a Bar matter, where plaintiff brings suit in federal district court seeking to enforce his federal constitutional rights in general challenges of state statutes' federal constitutionality, the federal (district) court has subject matter jurisdiction, where plaintiff need not and does not seek review of a state court's adjudication of a particular case (application).**

In District Columbia Court of Appeals v Feldman, 460 U.S. 462 (1983), this Court stated:

> "To the extent that Hickey and Feldman mounted a general challenge to the constitutionality of Rule

> 461(b)(3), however, the District Court did have subject-matter jurisdiction over their complaints. The difference between seeking review in a federal district court of a state court's final judgment in a bar...matter and challenging the validity of a state bar admission rule has been recognized in the lower courts and, at least implicitly, in the opinions of this Court." 460 U.S. at 483, 484.

In Feldman, this Court also stated: "We have recognized that state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. See, e.g. Supreme Court of Virginia v Consumers Union, 446 U.S. 719...Lathrop v Donahue, 367 U.S. at 827...challenges to the constitutionality of state bar rules, therefore, do not necessarily require a U.S. District Court to review a final state court judgment in a judicial proceeding. Instead, the district court may simply be asked to assess the validity of a rule promulgated in a

nonjudicial proceeding. If this is the case, the District Court is not reviewing at state-court judicial decision." Id 460 U.S. 486.

In the instant case, the same rules should be applied. Here, in place of the plaintiff's attacking the validity of a rule promulgated by a state supreme court, he attacks the validity of another "nonjudicial" creation, i.e. a legislative one, namely a state statute.

Certainly, if the notion that gives subject matter jurisdiction in such matters is, indeed, the nonjudicial character of the rule or provision being attacked, certainly the act of a legislature (a state statute) should be treated the same as another "nonjudicial" promulgation, i.e. a state supreme court rule regulating the bar.

In Feldman, as to another aspect, this Court stated:

> "The remaining allegations in the complaint, however, involve a general attack on the constitutionality of Rule 461(b)(3). The respondents' claims that the rule is unconstitutional because it creates an irrebuttable presumption that only graduates of accredited law schools are fit to practice law, discriminates against those who have obtained equivalent legal training by other means, and impermissibly delegates the District of Columbia Court of Appeals power to regulate the bar to the American Bar Association, do not require review of a judicial decision in a particular case. The District Court, therefore, has subject-matter jurisdiction over these elements of the respondents' complaints." Id. 460 U.S. 487.

In the instant matter, likewise, the general attack on state statutes for their federal unconstitutionality do not require review of a "judicial decision in a particular case."

The Court of Appeals, Ninth Circuit, in its Opinion simply referred to the wrong aspect of Feldman and erroneously therefor came to the conclusion that

"only the United States Supreme Court, and not this Court, has jurisdiction to look behind that decision", referring to the disbarment decision in the California Supreme Court.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

DATED: December 9, 1990.

Respectfully submitted,

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